United Nations AT/DEC/1142

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1142

Case No. 1181: HOSSAIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Ms. Brigitte Stern;

Whereas at the request of Ayesha Hossain, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 24 March 2001, the Applicant filed an Application containing pleas which read as follows:

"*SECTION – II*
PLEAS

"...

2. ... ***reinstate [the Applicant] back into the project (UNICEF) with promotion and recognition***;

3. Award ***adequate compensation for the professional damages, personal and psychological harassment and financial loss*** that [the Applicant] sustained as a result of the malicious and unjustified action of UNICEF Bangladesh.

4. Award adequate compensation for the psychological, social and economical loss that [the Applicant] sustained due to unjustified separation from UNICEF

Bangladesh. This has ***deprived [the Applicant] of ... career advancement within the [United Nations] organisation ...***

...

6. Award [compensation for] ***loss of employment opportunities and other compensations [to be determined by] the Tribunal***."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 August 2001 and periodically thereafter until 30 April 2002;

Whereas the Respondent filed his Answer on 29 April 2002;

Whereas, at the Applicant's request, the Tribunal decided on 20 November 2002 to postpone consideration of this case until its summer 2003 session and, on 25 June 2003, to postpone consideration of this case until its fall 2003 session;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 7 June 1992 on a two-year fixed-term appointment as a Project Officer at the NO-C level, with the Water and Environment Sanitation Section (WESS) of the UNICEF Office in Dhaka, Bangladesh. Her appointment was subsequently extended several times, until her separation from service on 31 January 1997.

The Applicant's Performance Evaluation Reports (PERs) for the years 1992, 1993 and 1994 reflected ratings of "3" ("met most expectations, however, there is room for improvement") and "4" ("fully met, and occasionally exceeded expectations").

In June 1996, the Applicant's PER for the period 1 January to 31 December 1995 was completed, reflecting ratings of "3" and "2" ("frequently did not meet expectations"). The Applicant's submitted explanations regarding this PER, expressing her disagreement with her supervisor's ratings.

On 18 June 1996, the Chief, WESS, while acknowledging that there had been a delay in completing the Applicant's PER for 1995 and that this PER did not justify extension of the Applicant's contract, nevertheless recommended that the Applicant's appointment be extended for six months, in order to give her a chance to improve her performance. During this period, the Applicant would be placed under his direct supervision, at the end of which a recommendation for either further extension or termination of the contract would be made. On 19 June, the

Appointment and Placement Committee (APC) endorsed the Chief's recommendation.

On 15 September, 27 October and 20 November 1996, the Chief, WESS, held performance-related discussions with the Applicant. During these meetings, while acknowledging the Applicant's efforts to improve her performance, he indicated that her performance still remained below expectations. Consequently, on 4 December, the Chief, WESS, recommended that the Applicant's contract not be renewed beyond its expiration date. On 10 December, the APC endorsed the above recommendation and on 12 December, the Representative, UNICEF, Bangladesh, approved it.

On 22 December 1996, the Applicant was informed of the decision not to extend her appointment. She was further informed that, on an exceptional basis, she would be granted a one-month extension, through 31 January 1997, to give her time to prepare her separation from UNICEF.

On 4 March 1997, the Applicant requested administrative review of the decision not to extend her fixed-term contract and, on 3 June, she was informed that the decision would stand.

On 23 June 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 30 March 2000. Its conclusion and recommendation read, in part, as follows:

> "***Conclusion and Recommendation***
>
> 25. The Panel found that the failure over a period of six months to supply the PER[s] for the Appellant's service [for the years 1995 and 1996] was a violation of the applicable rules, depriving her of the possibility to receive proper consideration for a career with the United Nations.
>
> 26. ... the Panel *unanimously agreed* that the Appellant's rights and due process had been violated by the responsible officers.
>
> 27. The Panel therefore *recommends* unanimously that the Appellant be paid compensation equivalent to one month net base salary for the denial of her rights.
>
> ..."

On 27 July 2000, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "...
>
> The Secretary-General first points out that the Board erred in its finding that your PER for 1996 was completed six months later, as it was completed two and a half months later, which is not unreasonable. The Secretary-General acknowledges the six months delay in completing your PER for 1995. He considers, however,

> that this delay did not deprive you of the possibility to rebut the PER or to improve your performance, as you received a six months extension of your appointment, precisely in order to give you a chance to demonstrate your potential for improvement. In light of the foregoing, the Secretary-General does not accept the Board's conclusion and recommendation and has decided to take no further action on your appeal. ..."

On 24 March 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's PER for 1995 did not reflect her actual performance.

2. The Applicant was not offered help to correct her "so called deficiencies". The monthly meetings with her supervisor were a planned "de-skilling" process.

3. The delay in submission of the Applicant's PER violated her rights.

4. At the time of her recruitment, the Applicant was informed that her post would continue as long as there were funds available. It was on this long term offer that she gave up her previous post.

5. The Applicant suffered discrimination.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under her fixed-term appointment nor a legal expectancy of continued employment with the United Nations.

2. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice, discrimination, bias, improper motivation or other extraneous factors.

3. The Applicant was not unduly prejudiced by the preparation of a late PER, since her contract was extended in order to give her an opportunity to rebut that PER or to improve her performance, before the non-renewal decision was taken.

The Tribunal, having deliberated from 8 to 20 November 2002 in New York; on 25 June 2003 in Geneva; and, from 22 October to 17 November 2003 in New York, now pronounces the following Judgement:

I. The Applicant served as a Project Officer at the National Professional NO-C Level, assigned to the Water and Environment Sanitation Section (WESS) of UNICEF, Bangladesh, from June 1992 until her separation from service as of 31 January 1997. She had served on a number of successive fixed-term contracts, each containing a clause stipulating that such appointment did not carry any expectancy of renewal or conversion to any other type of appointment in the Secretariat of the United Nations. Save for a

submission set out in her Application, that on the interview which had taken place prior to her appointment she was informed by some unidentified person or persons that her post would continue for so long as funds were available, she makes no case that she enjoyed a legal expectancy of continuing beyond the term of any fixed-term appointment that she might be offered and take up. She says that she understood that particular alleged promise as meaning that, for so long as there were funds available for "her post", she would continue to occupy it. Such a vague and unsubstantiated alleged indication would be wholly insufficient to found a claim that she had a legal expectancy or an enforceable contract to have remained in the service of UNICEF beyond the expiration of her last fixed-term contract, or for compensation for separation on the expiry thereof. (See Judgements No. 199, *Fracyon* (1975); No. 422, *Sawhney* (1988); and, No. 1030, *Jensen* (2001).)

II. In this particular cas, it is clear from the record and it is not put in issue by the Respondent that she was not offered a further fixed-term appointment or an extension or continuation of employment, but that she was separated because her performance, as indicated and disclosed on her PERs for the 1995 and 1996 periods, was such, that did not merit the renewal of her service beyond that time. However, because she was not informed until 22 December 1996 of the decision not to extend her fixed-term appointment, which was then just about to expire, the Representative, UNICEF, Bangladesh, agreed to offer her a one-month extension, to expire on 31 January 1997, "in order to give [her] adequate time to prepare [her] separation from UNICEF". The Applicant accordingly separated from UNICEF on 31 January 1997, when that fixed-term appointment expired.

Since it is clear from the record and not put in issue that the Applicant would have been offered an extension had it not been for her performance, as assessed in the manner described, the Tribunal proceeds on a finding that she was in fact separated by reason of unsatisfactory performance over the periods in question.

III. The Applicant argues that the said PERs and the assessment of her performance as stated therein were unfair and prejudiced, and that they did not properly reflect her actual performance. Accordingly, she submits that her separation from service was invalid as a product of bias, unfairness and/or prejudice and she further submits that she should be reinstated and compensated for the damage to her reputation and the financial and other loss suffered by her as a consequence of the matters of which she complains. The Applicant further alleges that the decision not to renew her contract was based on the negative assessment of her performance in the 1995 PER, which was not completed until

June 1996, some six months after the performance period had ended, and that because it was prepared so late she did not have an opportunity of rebutting same.

IV. Whilst it is correct to state that the PER for the 1995 period (the calendar year of 1995) was indeed late (and the Tribunal is satisfied that the Applicant's performance as assessed therein would ordinarily have warranted a recommendation of non-renewal), the Second Reporting Officer recognized that its late preparation might well have prejudiced the Applicant. He therefore recommended that the Applicant's appointment be extended for an additional six months (from 1 July 1996 until 31 December 1996) so as to give her adequate time to effectively rebut the 1995 PER and recommended that for the extended period she be placed under close, direct and personal supervision and that detailed and extensive evaluations of her performance should be made periodically, in order to give the Applicant an opportunity of demonstrating her potential for improvement. A decision would then be made as to whether the Applicant's contract would be extended or terminated. This recommendation was approved by the Appointments and Placement Committee (APC), who recommended that a detailed list of her responsibilities and duties be prepared against which to assess her performance on a monthly basis.

V. The Applicant complains that the contested decision was vitiated by "*mal fide* intention", that it was "inhumane, unjustified, pre-planned and maliciously carried out", and that her former supervisor had used "objectionable language" which she viewed as "depersonalising and insulting, not consistent with the human rights charter ... which **has to be accounted for under the [United Nations] Charter"** (emphasis in her Application). She has also alleged that her "basic right as a women (sic) serving in an underdeveloped country has been violated" stating "[the United Nations] is promised bound to promote human rights and women freedom and rights to work by doing away with injustice". She then added "[i]t is very sad that women working in [the United Nations] are discriminated and debarred without any recourse to fair play. [The United Nations] is very much a man's world. Women in [the United Nations] are encouraged and not discriminated. I find that in my case it was a lie". The Applicant, however, does not specify how such alleged prejudice or *malfides* was manifested, either on the part of her former supervisor or on the part of her Second Reporting Officer who, despite the Applicant's unfavourable PER for the calendar year 1995, recommended that her contract be extended for an additional period of six months so as to permit her to rebut her PER and/or to improve her performance; or on the part of the APC, which recommended an extension of her contract and an opportunity to validate her performance or to demonstrate her potential. In essence she

goes no further than professing her own belief in her capability and competence, extolling her own virtues and maintaining that she should get credit for matters as if they had been undertaken single handedly by her, but which her superiors say were the result of team efforts, and, she concluded by indicating that her supervisor did not share the approval or appreciation which she claimed was her due.

Whilst the Applicant is clearly entitled to express her own view as to the magnitude of her own achievements and as to the virtuosity of her performance, the formal evaluation of a staff member's performance, under a formal performance evaluation scheme, is properly a matter for the Administration and is a valid exercise of administrative responsibility.

VI. As to the Applicant's complaints that the decision to separate her from service was motivated by bias, prejudice or other improper motive, the Tribunal has consistently held that the burden of establishing same lies with an Applicant making such allegations (see Judgments No. 93, *Cooperman* (1965); No. 465, *Safavi* (1989); and, No. 553, *Abrah* (1992)). The Tribunal, as was so in the case of the JAB, can find no evidence to substantiate these complaints. There is nothing in the record to establish them.

The Tribunal finds that the decision to separate the Applicant from service was made on honestly held grounds and was not vitiated by bias, prejudice, improper motivation or other extraneous factor and did not violate the Applicant's rights.

VII. The JAB in its report indicated that "the Panel also found that the Appellant's PER for the years 1995 and 1996 were completed six months beyond the due date, which led the Panel to believe that the non-completion of the Appellant's PER in time as required was meant to pave the way for her separation". Firstly, the Tribunal observes that this statement is demonstrably factually inaccurate. Whilst the PER for the calendar year 1995 was indeed six months late, there was a delay of two and a half months in relation to the latter one. Secondly, in so far as that finding may be intended to mean that the PERs were written with a view towards separating the Applicant from service, as is apparent from what has already been stated, the Tribunal could find no evidence which would support this conclusion. As earlier stated, as far as the Tribunal is concerned, the PERs expressed honestly held views based on *bona fide* assessments of the Applicant. The JAB had concluded that "the failure over a period of six months to supply the PER ... was a violation of the applicable rules, depriving [the Applicant] of the possibility to receive proper consideration for a career with the United Nations" and accordingly recommended unanimously that she be paid compensation equivalent to one month's net base salary for

the denial of her rights. This would be an extraordinarily meagre sum if the JAB had held that there was some predetermined motive to write unfavourable PERs so as "to pave the way for her separation" and likewise truly believed that the delays may have denied her proper consideration for a career with the United Nations.

The Respondent declined to act upon the JAB's said recommendation pointing out firstly the factual inaccuracy already referred to and then pointing out or submitting that she was not unduly prejudiced by the preparation of late PERs, since her contract was extended in order to give her an opportunity to rebut that PER or to improve her performance, before the non-renewal decision was taken. The Respondent submits that the decision not to renew her contract was not based solely on the negative assessment of her performance in the 1995 PER, which was completed in June 1996, six months after the performance period ended, but was also made having taken into account the detailed and extensive evaluation of the Applicant's performance in September, October and November 1996 when, subsequent to the completion of the 1995 PER, the Applicant's appointment was extended for six months to give her adequate time to effectively rebut her PER and to afford her close, direct and personal supervision to facilitate the improvement of her performance or to demonstrate her potential for improvement. It was subsequently extended for an additional month so as to give her time to prepare for separation from service. The Applicant, however, was assessed as being unable to raise her performance to the anticipated or hoped for level and her new supervisor was driven to conclude that her performance was not adequate and that her contract should not be renewed. He so recommended to the APC and also recommended the said extension of one month so that she could prepare for her separation. The same APC, which had previously recommended the extension of the Applicant's appointment, considered the matter at this juncture, reviewed all of the Applicant's PERs prepared since June 1992, as well as the notes prepared by the Personnel Officer following the monthly performance discussions which had taken place in September, October and November 1996. The APC concluded that the Applicant had been given "proper guidance and advice over the last six months on how to improve her performance and enough time to avail herself of the possibility to reply to the supervisor's comments. The APC had requested in June 1996 that

> "contract of [the] staff member be extended for six months to monitor more closely performance, give guidance to staff member and have the opinion on her professional competence from another supervisor. Since the staff member, at the end of this process, which was fair and equitable, did not show sufficient sign of improvement, and negative comments expressed by previous supervisors were confirmed, APC-C member concurred with the recommendation of [the]

supervisor not to renew the present fixed-term contract of [the Applicant]after its expiry date on 31 December 1996."

VIII. The Respondent submits that, in the circumstances, the delay in the completion of the Applicant's PER for the calendar year 1995 (which he submits was a brief delay) in no way prejudiced the Applicant's opportunity for rebuttal, performance improvement, or continued employment with the Organization.

The Tribunal agrees that in all of the circumstances, the potential for prejudice arising from the delay in the preparation of the 1995 PER was indeed limited. The Tribunal is satisfied that consideration of the Applicant's performance over the extended contract was taken into account when the decision to separate her from service was made, so that it was not made just on the basis of the 1995 PER. Nonetheless, it notes that there has been no excuse proffered for the delay of six months in the preparation of the 1995 PER, save that it was attributable to her immediate superior, who delayed notwithstanding the repeated complaints made by the Second Reporting Officer. The Tribunal furthermore cannot agree that this delay was "brief".

In all of the circumstances, the Tribunal sees no reason to interfere with or to disagree with the recommendation which had been made by the JAB in relation to the appropriate sum of compensation for this delay.

IX. Since this Application was on the Tribunal's docket for its fall 2002 session, the Applicant has sought, and continues to seek, postponement of the Tribunal's deliberations to enable her to file Written Observations, claiming inability to do so on unspecified medical grounds. The Applicant's requests have been granted from time to time, the last having been granted on the basis that it would be the final extension granted. The Tribunal wishes to emphasise that the Respondent, like an applicant, is entitled to an expeditious hearing and to finality. In the circumstances, the Applicant's latest request for yet another postponement is denied.

X. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant the sum of one month's net base salary at the rate in effect on the date of this Judgement, in compensation for the delay in the preparation of her 1995 PER; and,

2. Rejects all other pleas.

(*Signatures*)

Mayer **Gabay**
First Vice-President, presiding

Kevin **Haugh**
Second Vice-President

Brigitte **Stern**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary